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Choong Howei v Cheah Choo Eng & Ors and another appeal

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02–2785–11 OF 2012 AND B-02–2786–11 OF 2012
MOHD HISHAMUDIN YUNUS, AZAHAR MOHAMED AND ZAKARIA SAM JJCA
4 SEPTEMBER 2015

C

Civil Procedure — Judgments and orders — Setting aside — Allegation of fraudulent concealment of material fact in obtaining order — Whether application to set aside order may be made via separate court action — Whether failure to make full and frank disclosure of material facts established — Whether order irregular or nullity — Whether application to set aside order barred by laches

D

Companies and Corporations — Directors — Board of directors — Validity of appointment of board of directors — New board of directors appointed at EGM — New board of directors not registered in CCM records — Whether previous board of directors still valid board of directors of company

E

Equity — Defences — Laches — Application to set aside order of court — Whether applicant estopped from applying to set aside due to inordinate delay and their conduct

F

Wilayah Car Pool Bhd ('the company') was an investment holding company. Collectively the respondents held 15.8% shares in the company. Prior to the EGM of 17 Spetember 2009, the board of directors of the company consisted of nine persons ('the old board of directors'). At an EGM of the company on 17 September 2009, a resolution was passed for the removal of the old board of directors and all the respondents were elected as the new board of directors. The new board of directors had asked the company secretary, Foo Poh Khean, to certify the extract of the EGM for submission to the Companies Commission of Malaysia ('CCM') so that the new board of directors would be registered in the CCM records. Foo Poh Khean, however, refused to do so and thus the documentations filed by the respondents with the CCM were rejected. On 13 August 2010, the appellant, Choong Howei (a shareholder of the company) filed an action against the company vide OS 1926 seeking orders that the company convene an AGM for the year 2010 and that the old board of directors fix a date for the AGM, prepare the audited accounts and issue a notice of the AGM. The company did not defend the suit and consequently, on 9 November 2010 the appellant obtained order in terms of his application ('the

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order') based on the merits of the application. The company paid the appellant a sum of RM35,000 as agreed costs. In compliance with the order, the old board of directors convened the AGM for the year 2010. On 19 May 2011 an action was commenced by the company against the respondents claiming that the respondents were liable to reimburse the company the sum of RM35,000 that was paid to the appellant as costs. The company succeeded in its claim. The respondents' then commenced the present suit ('OS 2399') to set aside the order on the grounds that it was irregular. The High Court allowed the application and set aside the order on the grounds that there was no full and frank disclosure of the facts of the case presented to the trial judge at the hearing of OS 1926. Hence the present appeal by the appellant.

Held, allowing the appeals:

(1) The respondents could apply to the court to impugn the order via a separate court action, instead of by way of an appeal, because the respondents' allegation was that there had been fraudulent concealment of a material fact (see para 33).

(2) The learned High Court judge had erred in ruling that there was no full and frank disclosure by the appellant in OS 1926. Right up to the time when OS 1926 was filed, the respondents, although elected as directors of the company, had never registered themselves as directors of the company with the CCM. In fact, after the EGM of 17 September 2009, the respondents did not take control of the management of the company. Therefore, they could not claim to be the directors of the company. This meant that the old board of directors still remained as the board of directors of the company right up to the point of time when OS 1926 was commenced (see para 36).

(3) The respondents did not take the necessary legal action that was open to them to assert their right to be registered with the CCM as the new directors of the company. For instance, the respondents could have appealed to the High Court pursuant to s 11(10) of the Companies Act against the refusal of the CCM to register the new board of directors. They could not just sit back and do nothing but to merely lament on Foo Poh Khean's conduct as being the cause of the problem that they had with the CCM (see paras 39–40).

(4) Since the respondents failed to enforce their right to be registered as the new directors of the company after a substantial lapse of time, the appellant, pursuant to the information obtained from the search made at the CCM, had the right to treat the old board of directors and not the respondents, as the directors of the company at the time of filing OS 1926. Hence, the question of the appellant concealing a material fact as to the affairs of the company in OS 1926 did not arise. The respondents

failed to establish fraudulent concealment of a material fact. Thus the order could not be said to be irregular or a nullity (see para 41).

(5) The respondents were also guilty of laches. For two years the respondents did nothing to ensure that they were registered with CCM as the new directors; instead, they had allowed the names of the old directors to remain in the records of the CCM. During the two year period the respondents had allowed two AGMs of the company to take place. The respondents refused to attend the two AGMs although they were duly notified. They took no steps to promptly challenge the validity of either the order or the two AGMs. At these AGMs, directors of the company were elected and the audited accounts of the company were approved; dividends were declared and the respondents accepted the dividends paid to them without protest. It would thus be unjust to grant the orders prayed for by the respondents in OS 2399. The respondents had slept upon their rights and acquiesced for a great length of time. The respondents by reason of the inordinate delay and their conduct were estopped from challenging the validity of the order or the validity of the two AGMs (see paras 42 & 44); *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 referred.

[Bahasa Malaysia summary

Wilayah Car Pool Bhd ('syarikat') merupakan sebuah syarikat pegangan pelaburan. Secara kolektif, responden memegang 15.8% saham dalam syarikat tersebut. Sebelum EGM 17 September 2009, lembaga pengarah syarikat terdiri daripada sembilan orang ('lembaga pengarah lama'). Semasa EGM syarikat pada 17 September 2009, resolusi bagi penyingkiran lembaga pengarah syarikat diluluskan dan responden-responden dilantik sebagai lembaga pengarah. Lembaga pengarah baru telah meminta setiausaha syarikat, Foo Poh Khean, untuk mengesahkan pengekstrakan EGM bagi penyerahan kepada Suruhanjaya Syarikat Malaysia ('SSM') agar lembaga syarikat didaftarkan dalam rekod SSM. Walau bagaimanapun, Foo Poh Khean enggan berbuat sedemikian dan dengan itu, dokumentasi difailkan oleh responden-responden kepada SSMP ditolak. Pada 23 Ogos 2010, perayu, Choong Howei (pemegang saham syarikat) memfailkan tindakan terhadap syarikat melalui OS 1926 memohon perintah-perintah agar syarikat menubuhkan AGM bagi tahun 2010 dan agar lembaga pengarah lama menetapkan tarikh AGM, menyediakan akaun yang diudit dan mengeluarkan notis AGM. Syarikat tidak membela guaman ini dan dengan itu, pada 9 November 2010, mendapatkan perintah bersyarat bagi permohonannya ('perintah') berdasarkan merit permohonan. Syarikat membayar RM35,000 kepada perayu sebagai kos yang dipersetujui. Mematuhi perintah tersebut, lembaga pengarah lama menubuhkan AGM pada 2010. Pada 19 Mei 2011, satu tindakan dimulakan oleh syarikat terhadap responden-responden, dengan mendakwa bahawa responden-responden bertanggungan membayar semula

RM35,000 kepada syarikat yang telah dibayar kepada perayu dengan kos. Syarikat berjaya dalam tuntutannya. Responden-responden kemudiannya memulakan guaman ini (OS 2399) untuk mengetepikan perintah tersebut atas alasan bahawa ia tidak teratur. Mahkamah Tinggi membenarkan permohonan dan mengetepikan perintah atas alasan bahawa tiada pendedahan penuh dan jujur mengenai fakta kes yang dikemukakan kepada hakim bicara semasa perbicaraan OS 1926. Oleh itu, rayuan ini oleh perayu.

Diputuskan, membenarkan rayuan-rayuan:

(1) Responden-responden boleh memohon kepada mahkamah untuk membangkitkan keraguan ke atas perintah tersebut melalui tindakan mahkamah yang berasingan dan bukan melalui rayuan kerana dakwaan responden-responden bahawa berlaku penyembunyian fakta fraud material (lihat perenggan 33).

(2) Hakim Mahkamah Tinggi terkhilaf dalam memutuskan bahawa tidak ada pendedahan penuh dan jujur oleh perayu dalam OS 1926. Hingga semasa OS 1926 difailkan, responden, walaupun dilantik sebagai pengarah syarikat, tidak pernah mendaftar diri mereka sebagai pengarah syarikat dengan SSM. Malah, selepas EGM pada 17 September 2009, responden-responden tidak mengambil alih pengurusan syarikat. Oleh itu, mereka tidak boleh mendakwa diri mereka sebagai pengarah-pengarah syarikat. Ini bermakna lembaga pengarah lama masih kekal sebagai ahli lembaga pengarah syarikat sehingga OS 1926 bermula (lihat perenggan 36).

(3) Responden tidak mengambil tindakan undang-undang yang diperlukan yang terbuka kepada mereka untuk menegaskan hak mereka untuk mendaftar dengan SSM sebagai pengarah baru syarikat. Sebagai contoh, responden boleh membuat rayuan kepada Mahkamah Tinggi di bawah s 11(10) Akta Syarikat terhadap keengganan SSM untuk mendaftar lembaga pengarah baru. Mereka tidak boleh hanya duduk dan tidak berbuat apa-apa tetapi semata-mata mengatakan bahawa tindakan Foo Poh Khean adalah punca masalah yang mereka hadapi dengan SSM (lihat perenggan 39–40).

(4) Memandangkan responden gagal untuk menguatkuasakan hak mereka untuk didaftarkan sebagai pengarah baru syarikat selepas tempoh yang lama, perayu, berikutan maklumat yang diperolehi dari carian yang dibuat di SSM, mempunyai hak untuk menganggap lembaga pengarah lama dan bukan responden, sebagai pengarah syarikat semasa pemfailan OS 1926. Oleh itu, persoalan perayu menyembunyikan sesuatu fakta material tentang hal ehwal syarikat dalam OS 1926 tidak timbul. Responden gagal membuktikan penyembunyian fraud sesuatu fakta material. Oleh itu perintah itu tidak boleh dikatakan sebagai tidak teratur atau satu pembatalan (lihat perenggan 41).

(5) Responden juga bersalah atas kelengahan. Selama dua tahun, responden tidak berbuat apa-apa untuk memastikan mereka didaftarkan dengan SSM sebagai pengarah baru; sebaliknya, mereka membenarkan nama pengarah-pengarah lama kekal dalam rekod SSM. Dalam tempoh dua tahun ini, responden telah membenarkan dua AGM syarikat berlalu. Responden enggan menghadiri kedua-dua AGM walaupun mereka diberitahu dengan sewajarnya. Mereka tidak mengambil langkah segera untuk mencabar kesahihan terhadap kedua-dua perintah atau dua AGM tersebut. Semasa mesyuarat agung tahunan ini, pengarah syarikat dipilih dan akaun syarikat yang diaudit telah diluluskan; dividen diisytiharkan dan responden menerima dividen yang dibayar tanpa bantahan. Oleh itu, tidak adil untuk memberikan perintah yang dipohon oleh responden dalam OS 2399. Responden mengabaikan hak-hak mereka dan bersetuju bagi jangka masa yang lama. Akibat kelengahan dan tindakan mereka, responden-responden diestop daripada mencabar kesahihan perintah atau kesahihan kedua-dua AGM (lihat perenggan 42 & 44); *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 dirujuk.]

Notes

For a case on board of directors, see 3(1) *Mallal's Digest* (5th Ed, 2015) para 217.

For cases on laches, see 6(3) *Mallal's Digest* (5th Ed, 2015) paras 2899–2904.

For cases on setting aside, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5431–5500.

Cases referred to

Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1989] 2 MLJ 202, HC (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Hock Hua Bank Bhd v Sahari Bin Murid [1981] 1 MLJ 143; [1980] 1 LNS 92, FC (refd)

Pilecon Engineering Bhd v Malayan Banking Bhd & Ors [2012] 3 MLJ 100, HC (refd)

Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd [2013] 5 MLJ 1; [2013] 6 CLJ 673, FC (refd)

Legislation referred to

Companies Act 1956 ss 11(9), 11(10)

Appeal from: Originating Summons No 24–2399–09 of 2011 (High Court, Shah Alam)

Eg Kaa Chee (Rajah, Lau & Associates) in Civil Appeal No B-02–2785–11 of 2012 for the appellant.
Francis Goh (Francis Goh & Co) in Civil Appeal No B-02–2786–11 of 2012 for the appellants.
Yusuf Khan (Fong Teng Fook with him) (Yusuf Khan & Fong) for the respondents in both appeals.

Mohd Hishamudin Yunus JCA (delivering judgment of the court):

INTRODUCTION

[1] There are two appeals before us, namely:

(a) Civil Appeal No B-02–2785–11 of 2012 ('Appeal 2785'); and

(b) Civil Appeal No B-02–2786–11 of 2012 ('Appeal 2786').

[2] They were heard together.

[3] These appeals arose from a decision of the High Court of Shah Alam of 22 October 2012 on an originating summons application by the respondents in the appeals, namely, Shah Alam High Court Originating Summons No 24–2399–09 of 2011 ('OS 2399'). The respondents are the plaintiffs in OS 2399.

[4] The High Court of Shah Alam, by its decision of 22 October 2012, had allowed the respondents'/plaintiffs' application in OS 2399; and had made the following order:

(a) an order declaring that the decision taken and resolutions passed at the extraordinary general meeting of Wilayah Car Pool Bhd on 17 September 2009 ('the EGM') is valid and enforceable in law;

(b) an order that the Companies Commission of Malaysia do register the Form 48A and Form 49 of Wilayah Car Pool Bhd ('the company') in respect of the result of the EGM;

(c) an order that the order of the court dated 9 November 2010 granted by the Shah Alam High Court in Originating Summons No 24–1926 of 2010 ('OS 1926') is set aside forthwith;

(d) a declaration that the annual general meeting of the company held on 30 December 2010 ('the AGM of 30 December 2010') is null and void;

(e) a declaration that the annual general meeting of the company held on 27 June 2011 ('the AGM of 27 June 2011') is null and void;

(f) an order that the second, third, fourth, fifth, sixth, seventh, and eighth defendants do deliver all the statutory records, accounting records and properties of the company to the board of directors elected at the EGM;

(g) an order that the costs of this action be taxed and paid forthwith by the defendants to the plaintiffs;

(h) an order that the first defendant do refund and reimburse the company the amount of RM35,000 paid by the company to the first defendant;

(i) an order that the defendants do pay all the losses and damages incurred by the company consequent to the order dated 9 November 2010 in OS 1926; and

(j) an order that the ninth defendant, Foo Poh Khean, do pay all the losses and damages of the company.

[5] The appellants in the present appeals are the defendants in the OS 2399. 'First defendant' in the above order refers to the first defendant in OS 2399, Choong Howei, the sole appellant in Appeal 2785. 'Ninth defendant' in the above order refers to the ninth defendant in OS 2399, Foo Poh Khean, the eighth appellant in Appeal 2786. 'Second, third, fourth, fifth, sixth, seventh, and eighth defendants in the above order refers to the second, third, fourth, fifth, sixth, seventh, and eighth defendants, respectively, in OS 2399, and are the first appellant (Choong Chee Hoong), second appellant (Chong Kwan Kian), third appellant (Lim Ting Ching), fourth appellant (Lee Lai Chan), fifth appellant (Liew Boon Chuan), sixth appellant (Moo Thart Choong) and seventh appellant (Ng Cheak Kheng), respectively, in Appeal 2786.

[6] Aggrieved by the decision, the appellants/defendants, by two separate notices of appeal, appealed to this court. The single appellant in Appeal 2785 filed his notice of appeal on 12 November 2012, whilst the ten appellants in Appeal 2786 filed their joint notice of appeal on 8 November 2012.

[7] We heard the two appeals together on 29 May 2014, 8 August 2014 and 31 October 2014. At the conclusion of the hearing of the appeals (on 31 October 2014), by a unanimous decision, we allowed the appeals with costs.

[8] We now give our grounds.

FACTS OF THE CASE

[9] The company (the tenth defendant in OS 2399; but not a party in these appeals) was incorporated on the 25 October 1994 as an investment holding

company. Its shareholders are owners of driving schools. It has both its registered and business addresses at Lot 8660, Jalan Besar, Kpg Sg Buah Luar, Dengkil, Selangor. The company holds 82% shares in a company known as Pusat Latihan Memandu Cemerlang Bhd ('PLMCB'). PLMCB is in the business of providing driving courses and driving tests.

[10] Collectively the respondents hold 192,000 shares out of a total of 1,213,000 shares in the company. In other words the respondents hold only 15.8% shares in the company

[11] Prior to the EGM of 17 September 2009, the board of directors of the company consisted of the following nine persons:

(a) Choong Chee Hoong;

(b) Chong Kwan Kian;

(c) Lim Ting Ching;

(d) Lee Lai Chan;

(e) Liew Boon Chuan;

(f) Moo Thart Choong;

(g) Ng Cheak Kheng;

(h) Koh Ah Bah (ninth appellant in Appeal 2786/eleventh defendant in OS 2399); and

(i) Yeow Bon Chong (tenth appellant in Appeal 2786/twelfth defendant in OS 2399);

[12] This board of directors will be referred to in this judgment as 'the old board of directors'. An EGM of the company took place on 17 September 2009. At this EGM a resolution was passed for the removal of the old board of directors; and all the respondents, namely:

(a) Cheah Choo Eng;

(b) Goh Ah Lai;

(c) Lim Yat Foong;

(d) Mong Tong Sang @ Moong Ching Heng;

(e) Saw Kong Nam; and

(f) Woo Ah Choy @ Foo Ah Choy.

were elected as the new board of directors. The new board of directors had asked the company secretary, Foo Poh Khean, to certify the extract of the EGM

for submission to the Companies Commission of Malaysia ('CCM') so that the new board of directors would be registered in the CCM records.

[13] Foo Poh Khean, however, refused to certify. This resulted in the documentations filed by the respondents with the CCM being rejected. The CCM required a director of the company and the company secretary to jointly certify the extract of the EGM. What had happened was that at the EGM Foo Poh Khean had refused to be the secretary of the EGM and to take down the minutes. The members present at the EGM then elected one Ow Sam Loy to act as the secretary of the EGM.

[14] About eight months after the EGM, on 2 June 2010, Choong Howei, a shareholder, wrote to the company secretary (Foo Poh Khean) inquiring whether the company's AGM for the year 2010 had been held; and, if not held, what was the last day for the AGM to be held. By a letter dated 3 June 2010 the company secretary replied that the last day for the AGM to be held was 30 June 2010; and that he did not receive any instruction from the board of directors of the company to hold any AGM for the year 2010. Choong Howei in a subsequent inquiry to the company secretary vide letter dated 23 June 2010 asked as to whether the company had received dividends from its subsidiary Pusat Latihan Memandu Cemerlang Bhd ('PLMCB') and had declared the dividends to its shareholders. The company secretary by his letter dated 24 June 2010 replied that the company did receive dividends from PLMCB but had not declared the dividends to the shareholders of the company since no meeting of the board of directors had been held since 25 August 2009. Now the Companies Act 1965 ('the Companies Act') requires that the AGM be held latest by 30 June 2010. Failure to do so amounts to a breach of the Act.

[15] Choong Howei then made a search at the office of the CCM to ascertain who were the members of the board of directors of the company. The search showed that the following persons were still listed as the board of directors:

(a) Choong Chee Hoong;

(b) Chong Kwan Kian;

(c) Lim Ting Ching;

(d) Lee Lai Chan;

(e) Liew Boon Chuan.

(f) Moo Thart Choong;

(g) Ng Cheak Kheng;

(h) Koh Ah Bah; and

(i) Yeow Bon Chong.

[16] In other words, the old board of directors was still on record the board of directors of the company.

[17] On 13 August 2010 Choong Howei filed an action against the company vide OS 1926 seeking for an order:

(a) that the company convened an AGM for the year 2010; and

(b) that the old board of directors do forthwith:

(i) fix a date for the AGM for the year 2010;

(ii) prepare the audited accounts of the company; and

(iii) issue a notice of the AGM to all the registered shareholders of the company.

[18] The cause papers for OS 1926 were duly served on the company. The company did not defend the suit. No affidavit in opposition was filed. The company and its counsel were not present at the hearing of OS 1926 on 9 November 2010. Consequently, on 9 November 2010 Choong Howei obtained an order as prayed for in the originating summons based on the merits of the application.

[19] The company paid Choong Howei a sum of RM35,000 as agreed costs.

[20] In compliance with the court's order of 9 November 2010 (in OS 1926), the old board of directors convened the AGM of the company for the year 2010.

[21] On 19 May 2011 the appellants in Appeal 2786 through their solicitors (Messrs Francis Goh & Co) issued a notice demanding each of the respondents to pay costs of RM35,000. They refused to pay. The company then commenced an action against the respondents vide Shah Alam Sessions Court Summons No 52–1783 of 2011 claiming that the respondents were jointly and severally liable to reimburse the company the sum of RM35,000 that was paid by the company to Choong Howei as costs. The company succeeded in its claim.

THE RESPONDENTS' CLAIM IN THE PRESENT ACTION (OS 2399)

[22] The respondents'/plaintiffs' complaint is that the court order of 9 November 2010 (in OS 1926) is irregular for the following alleged reasons:

(a) Choong Howei had knowledge that the respondents were elected as the new directors of the company on 17 September 2009 but had feigned

ignorance, and in the OS 1926 had named the old board of directors as the directors of the company to carry out the AGM for the year 2010.

(b) Choong Chee Hoong had acknowledged that the respondents were the elected directors of the company at the EGM, yet he went ahead to lead the old board of directors, to represent the company, and to convene the AGM. It is the respondents who should have convened the AGM since they were the new board of directors.

(c) The AGM of 30 December 2010 was null and void as it was not convened by the legally constituted board of directors.

(d) Messrs Francis Goh & Co on behalf of the appellants in Appeal 2786 had proceeded to claim against each of the respondents for RM35,000 as costs in the OS 1926 proceedings. The appellants alleged that the respondents were the directors who were responsible for the loss of RM35,000. But this allegation is in direct contradiction to the position taken by Choong Chee Hoong in respect of the AGM.

(e) Choong Howei had no locus to commence OS 1926.

[23] Therefore, the respondents seek, among others, the following declarations or orders:

(a) a declaration that the decision taken and resolutions passed at the EGM is valid and enforceable in law.

(b) an order that the CCM do register the Form 48A and Form 49 of the company that had been submitted as a record of the result of the EGM.

(c) an order that the order of 9 November 2010 granted under OS 1926 be set aside forthwith.

(d) a declaration that the AGM of 30 December 2010 is null and void.

(e) a declaration that the AGM of 27 June 2011 is null and void.

THE DECISION OF THE HIGH COURT JUDGE

[24] The judgment of the learned High Court judge, with respect, is disappointing. It is brief and lacks judicial analysis. After setting out the 'plaintiffs' complaint' in her grounds of judgment, the learned High Court judge then abruptly made the following brief findings:

Findings

(1) There was no full and frank disclosure of the facts of the case presented to the trial judge at the hearing of the Originating Summons No. 24-1926-2010. If full and frank disclosure had been made, I am sure the court would not have granted the order dated 9 November 2010.

(2) The default order dated 9 November 2010 is a nullity and must be set aside.

(3) The 1st defendant is using the court as a tool to obtain his agenda of calling for an Annual General Meeting of the company. As the order dated 9 November 2010 is a nullity, the Annual General Meetings held in 2010 and 2011 are invalid.

(4) The 1st defendant is not entitled to retain the RM35,000 costs given to him by the Company for an irregular default judgment.

(5) The plaintiffs herein had become the victims of unscrupulous acts of the 1st, 2nd, and 9th defendants. The plaintiffs are the new Board of Directors who should manage the company.

[25] Why did the learned High Court judge hold that there was no full and frank disclosure? This is not explained in her grounds of judgment. Why did she hold that the order of 9 November 2010 was a nullity? Again this is not explained. It hardly needs reminding that every judgment must be a reasoned judgment with clear judicial analysis.

[26] The learned High Court judge in her grounds of judgment referred to the order of 9 November 2010 as a 'default' judgment. We have read the judgment. With respect, it is not a default judgment. Mr Yusuf Khan concedes that it is not a default judgment. It is a judgment based on the merits.

THE APPELLANTS' SUBMISSION

[27] In these appeals, Mr Francis Goh (learned counsel for the appellants in Appeal 2786) and Mr Eg Kaa Chee (learned counsel for the appellant in Appeal 2785), in their respective submissions, contend that the learned High Court judge had erred in her decision for two reasons, namely:

(a) the learned High Court judge cannot set aside the order of the High Court in OS 1926. This is because one High Court cannot set aside the decision of another High Court of concurrent jurisdiction.

(b) the learned High Court judge failed to consider that the respondents were guilty of laches.

FIRST ISSUE: WHETHER ONE HIGH COURT MAY SET ASIDE THE DECISION OF ANOTHER HIGH COURT OF CONCURRENT JURISDICTION

[28] In the present OS 2399, filed on 14 September 2011, the respondents apply to set aside the order of 9 November 2010 made under OS 1926 by Hinshawati Shariff J, and, consequently, apply for a declaration that the AGMs of 2010 and 2011 are null and void. The issue before us is this: whether one

A High Court may set aside the decision of another High Court of concurrent jurisdiction. We note that the appellants had also raised this issue before the High Court. The learned High Court judge, however, in her brief grounds of judgment, failed to address this issue.

B **[29]** Mr Francis Goh (supported by Mr Eg) submits that the respondents in law cannot apply to set aside the order of 9 November 2009 made under the OS 1926 by way of a separate originating summons action (OS 2399). Learned counsel refers to the general principle that one High Court cannot set aside the order of another High Court of concurrent jurisdiction. The proper procedure C is to appeal. Counsel refers to *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 where the Federal Court (the judgment of Mohd Azmi FCJ) states the basic principle:

> It is of course settled law as laid down by the Federal Court in Hock Hua Bank case that one High Court cannot set aside a final order regularly obtained from another D High Court of concurrent jurisdiction.

[30] Learned counsel also cites *Pilecon Engineering Bhd v Malayan Banking Bhd & Ors* [2012] 3 MLJ 100.

E **[31]** Learned counsel for the respondents, Mr Yusuf Khan, on the other hand, submits that the respondents' action under OS 2399 comes under an exception to the basic principle since the order of 9 November 2010 that was obtained by the Choong Howei via OS 1926 was obtained by means of a F fraudulent concealment of a material fact to the court in that the fact that the respondents had been elected as directors of the company via the EGM of 17 September 2009 was not disclosed by the appellant to the court when seeking the OS 1926 Order. Learned counsel refers to the Federal Court case of *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143; [1980] 1 LNS 92 G where Chang Min Tat FJ held:

> But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment: *Hip Foong Hong v Neotia & Co* [1918] AC 888 and *Jonesco v Beard* [1930] AC 298.

H **[32]** In *Serac Asia Sdn Bhd v Sepakat Insurance Brokers Sdn Bhd* [2013] 5 MLJ 1; [2013] 6 CLJ 673 Abdull Hamid Embong FCJ in delivering the judgment of the Federal Court amplified on the exception to the basic principle where fraud is alleged:

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> [36] As regards the appellant's submission on the court being functus officio and that a fresh suit needs to be filed to strike out a previous regularly obtained order on the ground of fraud, we adopt the finding of this court in *Hock Hua Bank Bhd v Sahari Bin Murid* [1981] 1 MLJ 143; [1980] 1 LNS 92 which we think has settled these issues. The headnotes from the report in that case, which need no further

explanation, or expansion, is now reproduced as our answer to those related questions:

In this case the learned judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties and was made despite a claim of non est factum and allegations of fraud and forgery by the respondent. The order was drawn up and perfected. There was no appeal against it. The respondent applied to set aside the judgment and this application was refused. Subsequently the respondent applied again to set aside the previous orders. The learned judge thereupon set aside his order. The appellant appealed.

Held:

(1) the learned judge was functus officio;

(2) the court had no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it had been entered or an order after it has been drawn up, except under the slip rule, so far as it necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing;

(3) if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment;

(4) in this case the learned judge had no jurisdiction to set aside his own order and the original order must be restored, leaving it to the respondent to take out a fresh action to set aside the order on the ground fraud.

[37] Although both the courts below had referred to the cases of *Ling Kuok Teck & Anor v Tseng Choon Chin @ Tay Bak Hui & 5 Ors* [1995] MLJU 329; [1995] 3 CLJ 889 and the Hock Hua Bank Bhd (supra), which cases involved applications to impeach perfected judgments previously obtained on the grounds of fraud or non-disclosure of material documents, both the courts unfortunately missed to observe that in both cases fresh actions were filed to trash out the issue of fraud. In fact, Chang Min Tat FJ speaking for the Federal Court in the latter case, clearly stated that a 'fresh action will lie to impeach the original judgment', and that the court had 'no power under any application *in the same action* to alter, vary or set aside a judgment regularly obtained'. (Emphasis added.)

[38] Fraud on the court is obviously a serious allegation. It requires that higher standard of proof, one of beyond a reasonable doubt. In *Jonesco v Beard* [1930] AC 298 (HL), Lord Buckmaster observed that 'fraud is an insidious disease, and if clearly proved to have been used so that it might deceive the court, spreads to infect the whole body of the judgment'. The qualifying phrase 'if clearly proved' to us governs the manner on how fraud should be proved. In *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; [2001] 2 CLJ 321, it was held that a judgment may be impeached only for a 'deliberate fraud practiced upon the court' and that it is 'insufficient to show that a litigant merely convinced the court through misleading or erroneous evidence' (see the Australian case of *Price v Stone* [1964] VR 106). It has been otherwise described as 'cheating to get an advantage'. Thus, to

A us, there is a need for a fresh action to adjudicate the issue.

[33] We are of the view that in the present case based on the aforesaid authorities the respondents can apply to the court to impugn the order made in OS 1926 via a separate court action, instead of by way of an appeal, because the respondents' allegation is that there had been a fraudulent concealment of a material fact. Thus the matter comes under the exception to the general rule.

[34] But although we rule that the respondents may impugn the earlier order of 9 November 2010 by taking up a separate action in the form of OS 2399, still, the question arises: Was there in the present case a concealment of a material fact as alleged?

[35] But first in passing we wish to remark here that we have this disturbing observation: in the present case there are disputes as to material facts and, therefore, strictly the respondents should have filed a writ action instead of an originating summons to impeach the order of 9 November 2010. But, unfortunately, the appellants on their part did not raise this procedural issue either at the High Court or before us.

[36] Be that as it may, and putting the issue as to the appropriate mode of action aside, in our judgment the learned High Court judge, with respect, had erred in ruling that there was no full and frank disclosure by the applicant Choong Howei in his OS 1926 application. It is a fact that right up to the time when the OS 1926 was filed on 13 August 2010, the respondents, although elected as directors of the company at the EGM of 17 September 2009, yet they had never registered themselves as directors of the company with the CCM. In fact, after the EGM of 17 September 2009, the respondents did not take control of the management of the company. Therefore, they could not claim to be the directors of the company. This means that the old board of directors still remains as the board of directors of the company right up to the point of time when Choong Howei commenced OS 1926 in August 2010. The records of the CCM confirm this fact.

[37] The respondents put the blame on their non-registration as the new directors of the company with the CCM on the company secretary, Foo Poh Khean, in that the latter, as the company secretary, had refused to certify the extract of the EGM, thereby causing the respondents' application to the CCM to be the new board of directors of the company to be rejected. It will be recalled that Foo Poh Khean was not the secretary for the EGM. At the EGM one Ow Sam Loy was elected by the members present at the EGM to act as the secretary because Foo Poh Khean had refused to act as the secretary of the EGM and to take down the minutes. But Foo Poh Khean, besides refusing to be the

secretary for the purpose of the EGM, had also refused to certify the extract of the EGM. The extract of the EGM not being certified by the company secretary, the CCM, purportedly acting under s 11(9) of the Companies Act, refused to register the respondents as the new directors of the company. Section 11(9) of the Act reads:

> (9) The Registrar may require a person who submits a document for lodgment with the Registrar to produce to the Registrar such other document, or to furnish to the Registrar such information, as the Registrar thinks necessary in order to form an opinion whether he may refuse to receive or register the document.

[38] The CCM by a letter dated 30 September 2009 insisted that the extract of the EGM must be jointly certified by a director and the company secretary.

[39] But the pertinent point is that although faced with the predicament the respondents did not take the necessary legal action that was open to them to assert their right to be registered with the CCM as the new directors of the company. For instance, the respondents could have appealed to the High Court pursuant to s 11(10) of the Companies Act against the refusal of the CCM to register the new board of directors. Section 11(10) of the Act provides:

> (10) Any person aggrieved by the refusal of the Registrar to register any corporation or to register or receive any document or by any act or decision of the Registrar may appeal within thirty days of the decision of the Registrar to the Court which may confirm the refusal, act or decision or give such directions in the matter as seem proper or otherwise determine the matter but this subsection shall not apply to any act or decision of the Registrar –
>
> (a) in respect of which any provision in the nature of the appeal or review is expressly provided in this Act; or
>
> (b) which is declared by this Act to be conclusive or final or is embodied in any document declared by this Act to be conclusive evidence of any act, matter or thing.

[40] They could not just sit back and do nothing but to merely lament on the conduct of Foo Poh Khean as being the cause of the problem that they had with the CCM.

[41] Since the respondents failed to enforce their right to be registered as the new directors of the company after a substantial lapse of time, Choong Howei, pursuant to the information obtained from the search made at the CCM, had the right to treat the old board of directors (meaning the appellants in Appeal 2786), and not the respondents, as the directors of the company at the material time, that is to say, at the time of filing the OS 1926; and the question of Choong Howei concealing a material fact as to the affairs of the company in his OS 1926 application does not arise. It follows then that the respondents had

failed to establish fraudulent concealment of a material fact; and it also follows then that the OS 1926 order of 9 November 2010 cannot be said to be irregular or a nullity.

SECOND ISSUE: WHETHER THE RESPONDENTS WERE GUILTY LACHES

[42] Another reason why we hold that these appeals must be allowed is that the respondents were guilty of laches. They were elected as the new directors of the company on 17 September 2009; yet right until they filed OS 2399 on 14 September 2011, a lapse of two years, they did nothing to ensure that they were registered with CCM as the new directors; instead, they had allowed the names of the old directors to remain in the records of the CCM.But that is not the only problem. During the two year period the respondents had allowed two AGMs of the company to take place, that is to say, the AGM of 30 December 2010 (pursuant to the court order of 9 November 2010), and the AGM of 27 June 2011. The respondents refused to attend the two AGMs although they were duly notified. They took no steps to promptly challenge the validity of either the order of 9 November 2010 or the two AGMs. At these AGMs, directors of the company were elected and the audited accounts of the company were approved; dividends were declared and the respondents accepted the dividends paid to them without protest. It would thus be unjust to grant the orders prayed for by the respondents in OS 2399. The often cited principle on laches is well stated by Lord Selborne in the landmark case of *Lindsay Petroleum Co v Hurd* 874 LRPC 221:

> But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy.

[43] A local authority on the principle on laches can be found in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 where Edgar Joseph Jr J of the High Court of Penang held:

> Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such a delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a

waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: 14 *Halsbury's Laws of England* (3rd Ed) paras 1181, 1182. Laches has been succinctly described as 'inaction with one eye's open'.

[44] In the present case on the facts it is clear to us that the respondents had slept upon their rights and acquiesced for a great length of time. Thus the respondents by reason of the inordinate delay and their conduct are estopped from challenging the validity of the order of 9 November 2010 or the validity of the two AGMs.

[45] We therefore set aside the order of the High Court judge of 22 October 2012.

Appeal allowed.

Reported by Kanesh Sundrum